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VIRGINIA LAW REGISTER.

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MISCELLANEOUS NOTES.

Our readers will miss from the title-page of this, the initial number of Volume III, the name of Prof. C. A. Graves, one of the founders of the VIRGINIA LAW REGISTER, and an associate editor since its establishment. His withdrawal from the editorial staff is made necessary by the arduous duties of his chair at Washington and Lee University—duties rendered doubly burdensome by the recent death of his colleague, the lamented John Randolph Tucker.

Prof. Graves has struggled bravely against the necessity for this announcement, and in this struggle has been encouraged by his editorial colleagues, who were extremely loath to have him sever his connection with the REGISTER. It is due to Prof. Graves to say that the establishment of this journal was a conception of his, and the enthusiasm with which he entered upon the work he maintained under every difficulty. In emergencies he was a most valuable assistant and his fertile resources were freely and confidently drawn upon. In every issue of this journal the excellence of his work has been apparent, and if the VIRGINIA LAW REGISTER has deserved well of its patrons, to him is due a large share of the credit.

His relations, personal and official, with his editorial colleagues, were uniformly cordial and intimate, and the regret with which they announce his retirement is in some measure relieved by the assurance that these close and kindly relations will continue unabated. Readers of the REGISTER will be interested in the announcement that Prof. Graves will, from time to time, contribute to its columns.

93 VIRGINIA REPORTS.—Volume 93 of Virginia Reports has been printed and is now in the hands of the binders. It will probably be ready for delivery about May 15. It covers the period between April 2, 1896, and November 19, 1896, and contains one hundred cases.

ADMISSION TO THE BAR IN WEST VIRGINIA.—West Virginia has recently followed the tardy example of Virginia, in the matter of regulating admission to the bar, by placing the whole subject under control of the Court of Appeals. The West Virginia Bar closes its expressions of satisfaction over the passage of the law accomplishing this result by the sententious remark that "the sixteen incubators that have been hatching attorneys, sometimes in three weeks and sometimes off-hand, can no longer work."

THE COURT OF APPEALS, after a session at Richmond of nearly six months, divided into three terms with short intervals, adjourned on the 20th of April, to reconvene at Wytheville June the 8th. During the session a great deal of business was transacted, as the following statement will show:

Cases on the docket at the beginning of the November term, 1896, . . .	151
Cases added to the docket during the November, January and March terms, . . .	12
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Cases heard and determined, ...	106
Cases heard, but in hands of the court for opinions to be prepared, . . .	15
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Cases not reached, ...	40
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Opinions delivered, ...	98
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[This does not include cases argued and in hands of the court.]

Applications for appeals and writs of error during November, January and March terms, ...	117
Applications granted, ...	72
Applications refused, ...	45
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This is a splendid showing of work done, and the probability is that the whole docket at Richmond will be called through and all the cases disposed of at the next session at that place. This is a cheering prospect indeed.

ALIMONY TO HUSBANDS.—The decision of Judge Gibbons, of the Circuit Court of Cook county, Illinois, awarding alimony to a husband out of the wife's estate, noticed in 2 Va. Law Reg. 308, has been reversed on appeal. The opinion of the Appellate Court, by Gary, J., makes short work of the question. We present the opinion in full:

"The appellant filed a bill to obtain a divorce from appellee. The court ordered that she should pay him twenty dollars per month temporary alimony and twenty-five dollars solicitor's fees, from which order is this appeal. We do not review the cause shown on which such order was made, being of the opinion that if alimony from a wife to a husband be a proper thing upon circumstances legislation is necessary to authorize it. At common law a husband was required to provide his wife with necessaries, but there was no reciprocal duty.

"The statute gives her—not him—alimony. To give it to him is not to administer existing law, but to make new law. *Summers v. Summers*, 39 Kan. 132; *Green v. Green*, 68 N. W. Rep. 947.

"The order is reversed."

See 2 Va. Law Reg. 857.

CHECK AS AN ASSIGNMENT.—It is a well settled doctrine of the United States Supreme Court that the mere giving and receiving of a check does not operate as an assignment, *pro tanto*, of the fund to the credit of the drawer in the hands of the bank, either as between the drawee and the bank or as between drawer and

drawee. *Bank of Republic v. Millard*, 10 Wall. 152; *First Nat. Bank v. Whitman*, 94 U. S. 343; *Laclede Bank v. Schuler*, 120 U. S. 511. In the case of *Fourth Street Nat. Bank v. Yardley* (17 Sup. Ct. 439), just decided by that court, the question was presented in a slightly different form, and the court held that, under the peculiar circumstances, the giving and receiving of the check did operate as an assignment. The facts were that one bank requested a loan from another bank in the same city, of \$25,000 in clearing house certificates, in order to meet a clearing house balance, which it could not otherwise meet, by reason of a large part of its funds being on deposit in a distant bank. The officer of the borrowing bank exhibited to the lending bank a memorandum showing that his bank had to its credit in the distant bank a large reserve fund upon which he proposed to draw for the amount of the certificates borrowed. The certificates were accordingly delivered and the check on the foreign bank was given in payment. The next day the drawing bank failed and went into the hands of a receiver. It was held that, under the circumstances, an equitable assignment of the fund upon which the check was drawn resulted—such being evidently the intention of the parties, though not so expressed.

The distinction between this case and that of *Florence Min. Co. v. Brown*, 124 U. S. 385, and several other cases of similar character in the same court, is close, but is doubtless sound. In the case last cited, it was held that the mere giving and receiving of a check did not operate as an equitable assignment, so as to entitle the holder to priority over general creditors under a subsequent deed of assignment made by the drawers to secure creditors.

On the much mooted question, whether a check operates as an assignment or not, see 2 Dan. Neg. Inst. (4th ed.), 1635, *et seq.*; Morse on Banks and Banking, 496, *et seq.*; *Hulings v. Hulings etc. Co.* (W. Va.), 18 S. E. 620; note to *Sowden v. Clark*, 96 Am. Dec. 132; *Roberts v. Corbin* (Iowa), 96 Am. Dec. 146, and note; *James v. Newton*, 142 Mass. 366; *Lanigan v. Bradley* (N. J.), 24 Atl. 505.

APPEALS IN CRIMINAL CASES.—At the meeting of the American Bar Association in 1895 the following resolution was adopted :

“Resolved, That the Committee on Judicial Administration and Remedial Procedure be requested to consider the question whether there are any mischiefs or abuses caused by delays in criminal cases, resulting through existing systems of review by appeal or otherwise, and to present at the next meeting of the Association such recommendations as to a remedy therefor, or arrange for such further discussion upon the subject as they may deem best.”

This resolution was suggested by the remarks made in the address of Mr. Justice Brewer, before the Section of Legal Education, as follows (see 1 Va. Law Reg. 468): “The end of litigation should be almost always in the trial court. Business men understand that it is best that the decisions of their committees of arbitration should be final and without any review; while some of our profession seem to think that justice is more likely to be secured if, by repeated reviews in successive courts, even to the highest in the nation, the fees of counsel can be made to equal, if not exceed, the amount in controversy between the clients. In criminal cases there should be no appeal. I say it with reluctance, but the truth is, that you may trust a jury to do justice to the accused with more safety than

you can an appellate court to secure protection to the public by the speedy punishment of a criminal. To guard against any possible wrong to an accused, a board of review and pardons might be created with power to set aside a conviction, or reduce the punishment, if on the full record it appears, not that a technical error has been committed, but that the defendant is not guilty, or has been excessively punished."

The committee appointed under the resolution quoted above, of which Mr. Walter B. Hill, of Georgia, was chairman, in order to discharge the duty imposed by the resolution, sent a list of questions to members of the Association residing in the several States. Replies were received from thirty-seven members of the Association, residing in twenty-four States, one Territory, and the District of Columbia. These States, in the opinion of the committee represent all sections of the country, and it may be safely assumed that the same conditions exist in the other States.

The conclusions reached by the committee are as follows (see Report of American Bar Association, 1896, p. 374):

"1. That there is no general dissatisfaction with the system of review in criminal cases now in vogue in the several States.

"2. That the evils inherent in or growing out of these systems are not sufficient to justify such a change in the law as would deprive a person convicted of crime of the right of appeal for the determination of questions of law.

"3. A pardon board with jurisdiction to review the rulings of the trial court would constitute another and unnecessary appellate court. There are cases where, by reason of lapse of time or other causes, even partial relief from the penalties of an unjust conviction can be found only in the clemency of the executive or pardoning power, but the innocent man is entitled to every safeguard which law can provide to protect him against unjust conviction of crime."

USURY.—Western enterprise has recently evolved a most ingenious method of evading the usury laws. The only difficulty about it is that it will not work. The meddlesome and stupid courts decline to allow the inventor to reap the reward of his ingenuity. The underlying principle upon which the scheme rests is the familiar one that, where the lender puts the principal sum loaned in jeopardy, the loan is not usurious, though the rate of interest exceed the limit allowed by law—the most common illustrations of which are afforded by contracts of bottomry and respondentia (3 Minor's Inst. 313). The plan of our Western money-shark contemplates that the borrower shall bind himself to repay the loan in monthly installments, at an exorbitant rate of interest, but with the concession on the part of the lender that if the borrower die before the last installment of principal and interest is due, then the loan shall be considered paid and the entire obligation be cancelled. Thus, the principal being put in jeopardy and the usurious interest being dependent upon a contingency, to-wit, the continuance of the life of the borrower, the transaction seems to be well protected against the usury laws. But your Western creditor, while willing, for sake of evading penalties against usury, to go through the form of hazarding his principal, does not propose to risk it in fact. He accordingly exacts one slight concession from the borrower—so slight that no well-disposed borrower could reasonably object to it—which is that the lender shall have the privilege, at his own expense, of taking

out an insurance policy on the life of the debtor, for the amount of the loan. The policy is accordingly taken out, payable to the lender, who pays the premiums—but he has taken care to include in his interest-charge more than the cost of the insurance, over and above the legal rate. So that, after all, the principal has not been for a moment in jeopardy.

In condemning such a transaction as a shift to evade the penalties of usury, the Supreme Court of Minnesota, through Mitchell, J., in the case of *Missouri etc. Trust Co. v. McLachlan*, 61 N. W. 560, says:

“We had supposed that in the course of our professional and judicial experience, we had met with about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and, after a careful study of all its provisions, it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this State; but we shall take the plaintiff at his word and assume, without deciding, that it is not a life insurance contract, and hence that the laws of this State prohibiting and declaring invalid such contracts made by a foreign insurance company, which has not complied with our statutes, are inapplicable. It remains to consider whether the facts justify the conclusion that the scheme was devised as a cover for usury.”

And it was held that the scheme was a colorable device to conceal usury, and that the mortgage executed by the borrower to secure repayment of the loan was void; the court saying: “The mere fact that the contract has the form of a contingency will not exempt it from the scrutiny of the court, which is bound to exercise its judgment in determining whether the contingency be a real one, or a mere shift and device to cover usury.”

The same device met a similar fate at the hands of Caldwell, J., in *Missouri etc. Trust Co. v. Krumseig* (U. S. Circ. Ct. App.) 77 Fed. Rep. 32.

STATUTE OF LIMITATIONS.—DEMURRER.—LORD CAMPBELL'S ACT.—PERSONAL PLEA.—In briefly noticing, in a recent number (2 Va. Law Reg. 386), the subject of the statute of limitations, in connection with Lord Campbell's Act, we suggested that the limitation of one year prescribed by the Virginia statute (Code of 1887, sec. 2903) was not a mere limitation of the remedy but of the right itself; and hence that the limitation would not be affected by disabilities or other causes that clog the running of the ordinary statutes of limitation.

In the recent case of *Lambert v. Ensign Manufacturing Co.*, 26 S. E. 451, this question was squarely presented for the decision of the West Virginia Court of Appeals, along with the other equally interesting question, whether the defendant could interpose the limitation as a defense, by demurrer, when the fact appeared on the record. It was held that while the ordinary statute of limitations was a matter of confession and avoidance to be specially set up by plea and not by demurrer, yet where the limitation affected the right as well as the remedy, and it appeared from the record that the period of limitation had expired, the defense might be made by demurrer. The court said, in part:

“It is true that a statute of limitations pure and simple, which bars the remedy only, and thereby and to that extent destroys the right, the defendant must set up and rely on by way of plea before he can have the benefit of such bar. *Riddle v. McGinnis*, 22 W. Va. 253, 275; *Seborn v. Beckwith*, 30 W. Va. 774; 1 Bart. Law

Pr. 84; 4 Minor's Inst. pp. 692, 719; 1 Wood Lim. pp. 25, 27. And this has been the settled law in actions at law for more than two hundred years. See *Puckle v. Moor* (1672), Vent. 191; *Gould v. Johnson* (1702), 2 Ld. Raym. 838. And the reasons generally given are that it is personal, and may be waived, and must be pleaded, or in some way be shown to be relied on, and that it cannot be reached at common law by a demurrer, because the [adversary] pleader makes out his case as far as he needs at first to go, without withdrawing, it from saving clauses, or setting up matters in confession and avoidance of the statutory bar. It will be time enough to do this by replication, if defendant sees fit to plead the statute, which often he does not intend or wish to do."

The same view was taken in *Herrington v. Hankins*, 1 Rob. (Va) 591. See p. 599, where Stanard, J., is reported as saying, during the argument: "The defendant is required to avail himself of the statute by plea rather than demurrer, that the plaintiff may have the opportunity of bringing himself, if he can, within the exceptions."

To quote further from the West Virginia court:

"But here the cause of action did not exist at common law, but is created by statute. The bringing of the suit within two years from the death of the person whose death has been caused by wrongful act, is made an essential element of the right to sue, and it must be accepted in all respects as the statute gives it. And it is made absolute, without saving or qualification of any kind whatever. There is no opening for explanation or excuse. Therefore, strictly speaking, it is not a statute of limitation. See *The Harrisburg*, 119 U. S. 199, 214; 13 Am. & Eng. Enc. Law, 689, notes; *Taylor v. Coal Co.*, 94 N. C. 525; *Tiffany, Death by Wrongful Act*, 120, 121. The plea on the part of defendant would have been: 'The plaintiff's cause of action did not accrue within two years next before the bringing of the suit, and this he is ready to verify.' But plaintiff could not meet this by confession and avoidance [because, if true, there is no way of avoiding it], but only by denial by way of general replication. The demurrer says that the facts as they appear by the writ and declaration are not sufficient in law. So that in both modes it may be matter of fact to be determined by the court by inspection of the record, supposing the proof of the time of the death to correspond, as in this case it does, with the averment in the declaration. Therefore the defendant may take advantage of it by way of demurrer, as was done in this case, and as may be done in equity."

The Virginia Court of Appeals, in a *dictum* in *McCartney v. Potomac Electric Co.*, 26 S. E. 419, intimates that similar principles are applicable to the period of limitation prescribed by sec. 2481 of the Va. Code of 1887 (amended by Acts 1893-4, p. 576) for the enforcement of mechanics' liens. These liens being statutory, there would seem to be little doubt, on the principles discussed above, that the institution of proceedings to enforce them within the time fixed by the statute (six months) is a condition directly affecting the right, and not the remedy only.

For similar reasons it would seem that in an action under Lord Campbell's Act, the defendant might rely upon the limitation, under a plea of the general issue, without specially pleading the limitation. In *Layne v. Norris*, 16 Gratt. 236, it was held that where the defendant had been in adverse possession of personal property for the statutory period and thereby acquired title thereto, he might set up the statute under the general issue, without a special plea.

The case of *McCartney v. Potomac El. Co.* is important in another aspect, holding as it does, that while the statute of limitations is generally a personal plea and cannot be interposed by third persons, yet where "a court of equity has taken possession of a debtor's estate for the purposes of distribution and proceeded to ascertain the debts and incumbrances to enable it properly to administer and distribute the assets, an exception to the general rule is allowed, and any creditor interested in the fund is permitted to interpose the defense of the statute of limitations."

A similar ruling was made by a divided court, in *Smith v. Pattie*, 81 Va. 654. So in *Tuzewell v. Whittle*, 13 Gratt. 329, 345, a legatee was allowed to plead the statute against a claim asserted against the testator's estate by a creditor. In *Ayre v. Burke*, 82 Va. 338, on a question of priority between two judgment creditors, one was allowed to set up the statute of limitations against the other. And in *Blair v. Carter*, 78 Va. 621, a purchaser from a bankrupt, of after-acquired lands, was held entitled to plead the bankruptcy, in defense of his own title, against a judgment subsequently recovered against the bankrupt, on a debt provable in bankruptcy, notwithstanding the general rule that bankruptcy is a personal plea.

EFFECT OF A POWER OF DISPOSITION OVER PROPERTY ON THE ESTATE OF THE DEVISEE.—VALIDITY OF LIMITATION OVER.—See for full discussion, *Rubey v. Barnett*, 12 Mo. 3; 49 Am. Dec. 112, and note; also 1 Va. Law Reg. 219, note by Judge Burks to *Farish v. Wayman*, 91 Va. 430. The cases are difficult to reconcile on any other principle than that of giving free play to the testator's intention; but the subject may be thus summarized.

(1). When an express estate for life is given, and a power of disposition over the reversion is annexed, the devisee for life will not take an estate in fee, notwithstanding the power to dispose of the inheritance. The express estate for life negatives the intention to give the fee-simple, and converts those words into words of mere power, which, standing alone, would have been construed to carry an interest. Thus in *Rubey v. Barnett*, *supra*, the testator said: "First, my will is that my beloved wife, Polly Horn, have all my estate, both real and personal, so long as she may live; secondly, my will is that my wife dispose of all said estate as she may think most advisable at her death." Held, that Polly took but a life estate with a distinct and naked gift of a power of disposition of the reversion; and that if she made no disposition, the reversion descended to the heirs of the testator. And see to the same effect, *Burleigh v. Clough*, 52 N. H. 267 (13 Am. Rep. 23); *Funk v. Eggleston*, 92 Ill. 515 (34 Am. Rep. 136). And again, it is often held that where a power of disposal accompanies a bequest or devise of a life estate, the power is considered to be over the life estate only, and is limited to such a disposition as a life tenant can make, unless there are other words clearly indicating that a larger power was intended. Thus in *Johns v. Johns*, 86 Va. 333, the testator gave all of his money (\$900) to his wife during her natural life for the benefit of herself and children, "to be used as she may think proper." Held, that the use was of the life interest only, and the wife did not take the absolute property, as was contended on her behalf. And in *Brant v. Virginia Coal and Iron Co.*, 93 U. S. 326, the will read: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, . . . to have and to hold during her life, and to do with as she sees proper before her death." Held that the wife took a life estate in the prop-

erty, with only such power as a life tenant can have; and that her conveyance of the real estate passed no greater interest.

(2). When a life estate is given the devisee, with power of disposition, the devisee is held to take a fee-simple, *if otherwise the manifest intention of the will would be defeated*. This is by way of *exception* to the general rule laid down under (1) *supra*; and, resting on intention, must depend on the construction of the particular will. Thus, where the limitation is of a life estate, but there is given full power of disposition over the fee, by deed or by will, without limitation or restriction as to the time, mode, or purpose of its exercise, the devisee may be held to take, not the mere life estate expressly given, but the fee itself by implication. This is known in Virginia as the doctrine of *May v. Joynes* (20 Gratt. 692), where the testator said: "I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, *to her during her life, but with full power to make sale of any part of the said estate, and to convey absolute titles to the purchasers; and use the purchase money for investment, or any purpose that she pleases; with only this restriction that whatever remains at her death, shall, after paying any debts she may owe, or any legacies that she may leave, be divided as follows,*" viz: among his children and grandchildren. *Held*, that the wife took a fee-simple in the real estate, and an absolute property in the personal estate, and that the limitation over of *whatever remained at her death*, was inconsistent with, and repugnant to, such fee-simple and absolute property, and failed for uncertainty. See 1 Leading Cases R. P. 54, 65, 67; 2 Id. 478; 4 Id. 25, where *May v. Joynes* is said to be opposed to the weight of authority. But it has been followed in a number of cases in Virginia, and is supported by cases elsewhere, and may be defended, perhaps, on the ground of manifest intent.

These cases follow *May v. Joynes*:

(a) *Cole v. Cole*, 79 Va. 251: "I give to my wife, Martha A. E. Cole, all of my personal and real estate during her lifetime, and, at her death, half of the real estate and half of the personal property *that may be on hands* to do with as she may see proper; and the other half of my real estate and personal property to go to the heirs of my brother, Sampson Cole." See also *Carr v. Effinger*, 78 Va. 197.

(b) *Hall v. Palmer*, 87 Va. 354: "I will and direct that the whole of Susan J. Hall's and Frances Maria Armes's interest in my estate shall be held by my executor, his heirs, etc., for the sole use and benefit of them during their natural life, and at their death *the balance, if any*, to their children.

(c) *Bowen v. Bowen*, 87 Va. 438: "After the payment of all my just debts, I give, devise, and bequeath to my wife, Adelaide Bowen, all my estate, real, personal and mixed, *for and during her life*; and it is my wish and desire that my said wife may sell and convey my real estate, and receive the purchase money therefor; sell and use all of my personal property, and buy and sell with the proceeds such property for her own comfort and convenience as she may choose, without accountability to any person whatever. In fact, during the life of my said wife, I wish her to possess and enjoy the said property as if she enjoyed a fee-simple, and absolute estate therein. If, however, at the death of my said wife, any of the said property shall remain, I wish the same to be divided equally among all my nephews and nieces who may be living," etc.

May v. Joynes is also followed in *Farish v. Wayman*, 91 Va. 430 (criticised by

Judge Burks, 1 Va. Law Reg. 220), and in *Robertson v. Hardy*, 23 S. E. Rep. 766, where the doctrine is thus laid down by Riely, J., speaking of a will by the first clause of which the testator had given personal property to his wife for her life: "All the personal property remaining at my wife's death, of whatever kind or nature," says the testator in the second clause, "shall be sold and equally divided" among certain of his children. The words "remaining at my wife's death" imply power in the wife to use, consume, and dispose of the personal property; and such power implies absolute dominion. Absolute dominion imports absolute ownership. When it is the intention of the testator that the first taker shall have an unlimited power of disposition over the property, devised or bequeathed, whether such intention be expressed or necessarily implied, a limitation over to another is void, because it is inconsistent with, and repugnant to, the estate given to the first taker, although the will shows that it was the testator's intention, in respect of the subject of the gift, that what may remain of it at the death of the first taker should go to another."

The following Virginia cases distinguish *May v. Joynes*, and sustain the limitation over:

(a) *Randolph v. Wright*, 81 Va. 608: The devise was in effect "To my son Edward and his heirs forever I give two-thirds of my real estate; . . . but if Edward die without a will or lawful issue, then to my son Philip and his heirs." Testatrix died in 1849. See *Johnson v. Citizens Bank*, 83 Va. 63.

(b) *Johns v. Johns*, 86 Va. 333. See above under (1).

(c) *Smythe v. Smythe*, 90 Va. 638: "I give and bequeath unto my two sisters, Kate A. and Mattie R. Smythe, all my estate of every kind, both real and personal, of which I may die seised, to be by them used and enjoyed *during their natural lives*. . . . The use and enjoyment of the said property shall be unrestricted to my said two sisters during their natural lives should they remain sole, carrying with such use and enjoyment the right to sell and convey said real estate should they find it desirable to do so; but I desire that they shall reinvest or loan the proceeds of such sale in some safe manner, and as far as possible avoid the consumption of the principal; and at the death of my two sisters, or the marriage of both, I desire *whatever of my estate may remain*, shall vest in and become the property of the little boy Claude Allison, whom I have adopted." Lewis, P., and Richardson, J., dissented.

(3) When an estate is given to a person generally, or indefinitely (as, e. g., "To A"), with a power of disposition, it is held to amount to the fee-simple. Tiedeman R. P. p. 316, n. 2; sec. 564, n. 1. See *Roberts v. Lewis*, 153 U. S. 367 (s. c. 144 U. S. 653), overruling *Giles v. Little*, 104 U. S. 291. And in such a case, if there is a limitation over, it is void as a *remainder*, being after a fee simple; and void as an executory devise, because indefinite and uncertain, being in effect a limitation of so much only as the first taker may not happen to dispose of. But even in this case, if a *life estate only is plainly intended* by the will, a fee-simple in land, or an absolute interest in personal property, will not be construed to pass to the first taker, and a limitation over will be good. The great case establishing this exception is *Smith v. Bell*, 6 Peters, 68, before the Supreme Court of the United States. In *Smith v. Bell*, the will read: "Also I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality, soever, after payment of my debts, legacies, and funeral expenses, which

personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit, and disposal absolutely, the *remainder* of the said estate, after her decease, to be for the use of the said Jesse Goodwin (the testator's son).” It was held that the wife took only a life estate in the property (consisting mainly of slaves), and that the son Jesse had a vested remainder. The ground of the decision was the manifest purpose to provide for *both wife and son*, which could only be accomplished by such a construction. It was therefore held by Marshall, C. J., that the wife took a life estate only; that her power of disposition over the slaves was such (and no more) as a life tenant may make; and that “the strong words of bequest” employed by the testator probably referred to that part of the personal estate which was trifling and perishable, and would be consumed in the use, as to which the exercise of absolute ownership was necessary to a full enjoyment.

Smith v. Bell is approved in *Miller v. Potterfield*, 86 Va. 876, where the will was as follows: “I give and bequeath to my beloved wife, Elizabeth Miller, all my property, both real and personal, to have and to hold the same for her own use and benefit, and also to make such disposition of the same that (*sic*) she, in her judgment, may deem best, should it become necessary that a part or all *should become necessary (sic)* for the support of herself and William Garrett, who I desire should remain with her during her lifetime, and have such care and attention given him as he may need. After the death of the said Elizabeth Miller, I will and devise that any and all property *remaining unused* shall be given to the said William Garrett, to have and to use for his own benefit, or to make such disposition of as may be deemed best for his interest.” Held, the wife took a life estate, with a conditional power of sale, and that the limitation over to William Garrett was good. The case was distinguished from *Cole v. Cole*, 79 Va. 251, on the ground that in that case the power of disposal given to the first taker was *absolute*, which necessarily rendered the limitation over repugnant, and void. And in *Bowen v. Bowen*, 87 Va. 438, *supra*, it was said that the case at bar was distinguishable from *Johns v. Johns*, *supra*, and *Miller v. Potterfield*, by the fact that the power of disposal in the two latter cases was not for the *sole* benefit of the first taker, but in *Johns v. Johns* for the benefit of the widow and her children, and in *Miller v. Potterfield*, not only for the benefit of the widow, but of William Garrett. But in *Johns v. Johns*, it also appeared that the disposal conferred on the widow was *over the life estate only*, as has been stated above.

Smith v. Bell has been questioned, however (see *Cole v. Cole*, 79 Va. 251), and is perhaps against the weight of authority; and it can only be upheld by *magnifying the intent*. But it has never been overruled (or even doubted) by the Supreme Court of the United States, though in a number of cases it has been distinguished on the facts. See, especially, *Roberts v. Lewis*, 153 U. S. 367, 378. *May v. Joynes* in Virginia, and *Smith v. Bell* in the Supreme Court of the United States, stand at opposite extremes, and each is an exception to the general rule. The tendency now in the United States is to sustain the limitation over, if possible, in a case where property is given to the first taker with a power of disposal superadded.

C. A. G.